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Supreme Court of the United States

OCTOBER TERM, 1966

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Appellant

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The opinion of the District Court is reported at 214 F. Supp. 244, and is set forth as Appendix A to this Statement. The report of the Interstate Commerce Commission is printed at 307 ICC 311 and is reproduced as Appendix D to this Statement. The Proposed Report by the Interstate Commerce Commission Examiner, which is unreported, is reproduced as Appendix C to this Statement.

JURISDICTION

This action was brought under 28 U.S.C. 1336 by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company to set aside an order of the Interstate Commerce Commission. The decree of the three-judge court (Appendix B *infra*)

was entered on June 18, 1963, and the Chicago and North Western Railway Company ("North Western"), an intervening defendant in the district proceedings, after denial of its motion to vacate the decree on August 30, 1963, filed its notice of appeal in the district court on October 28, 1963.

The jurisdiction of this Court to review the judgment of the district court on direct appeal is confirmed by 28 USC 1253 and 2101(b). The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal: *United States* v. *Drum*, 368 U.S. 370 and *Minneapolis & St. Louis Railway Co.* v. *United States*, 361 U.S. 173.

STATUTES INVOLVED

The pertinent portions of Sections 1(18), 1(19), 1(20), 1(21), and 1(22) of the Interstate Commerce Act (49 USC 1(18-22) and are set forth in the margin of Appendix A, page 17.

QUESTION PRESENTED

After the Interstate Commerce Commission had affirmatively held that public convenience and necessity did not permit interconnection of the main lines of two Class I railroads at "Republic Junction," since it foresaw as a result of this interconnection potential preferences in divisions, car supply and other concessions to the most important shipper in the area, principal owner of one of those railroads, and certain harm by way of traffic diversion to existing railroads (Appendix D, pages 64-67) did the District Court exceed its function on review by examining the issue of I.C.C. jurisdiction *de novo* and by holding this subject "too small a matter to require the attention of the Interstate Commerce Commission?"

STATEMENT

In 1957 appellees Chicago, Milwaukee, St. Paul & Pacific Railroad Company ("Milwaukee") and Lake Superior and Ishpeming Railroad Company ("Ishpeming") commenced construction of a connecting track called "Republic Junction" in the upper peninsula of Michigan. It was completed, and operations commenced over Republic Junction on October 21, 1957, creating the first physical interconnection which had ever been established between the two carriers (Appendix D, page 45).

Both Milwaukee and Ishpeming are Class I common carrier railroads, but Ishpeming is in addition the controlled subsidiary of Cleveland Cliffs Iron Co., seller of the predominant part of the saw logs and chemical wood which are the principal goods shipped over Republic Junction (Appendix D, pages 50-63), and arguably the most important shipper of all goods in the entire upper peninsula (Appendix D, page 64).

On the complaint of Duluth, South Shore & Atlantic Railroad Company (now Soo Line Railroad Company, Appendix A, page 16) I.C.C. investigated to see if Milwaukee and Ishpeming had violated Section 1(18) of the Interstate Commerce Act (49 U.S.C. 1(18), set out at Appendix A, page 17, in the margin of the lower court's opinion). The Hearing Examiner found that they had and recommended that both carriers be prosecuted (Appendix C, page 36). Division 4 of I.C.C. affirmed the violation and ordered Milwaukee and Ishpeming to cease and desist,[1] finding the interconnection incompatible with the public interest which

1. On October 10, 1962 I.C.C. determined that it had no power to enter the cease and desist order, and it withdrew that action herein. The lower court declared that portion of this case moot (Appendix A, page 18), correctly, we contend.

I.C.C. was charged to protect (Appendix D, pages 64-67). Thus, since September 25, 1959 (the date of I.C.C.'s final order herein), Republic Junction should have been abandoned. Nevertheless, operations over that line continue, pursuant to injunctions entered below.

The three-judge court entered a preliminary injunction against effectiveness of the I.C.C. order on June 14, 1960; then after two pre-trial conferences, and several rounds of affidavits it received briefs and heard oral argument, finally enjoining the I.C.C. order on the merits some three years later, on June 18, 1963 (Appendix B, pages 25-28).

Thus Milwaukee and Ishpeming have actually been operating for over six years (since October 21, 1957, as shown by Appendix A, page 15) under the injunctions below, an operation for which the I.C.C. Examiner recommended that they be prosecuted (Appendix C, page 36) and which the I.C.C. affirmatively found was definitely not required by the public interest (Appendix D, pages 65-67) and in violation of Section 1(18).

THE QUESTION IS SUBSTANTIAL

Under Section 1(18) of the Interstate Commerce Act a railroad may not extend or abandon any of its line without a finding by I.C.C. that public convenience and necessity permit that action. If the carrier attempts such action without I.C.C. authority, the district courts are empowered by injunction to compel a carrier to seek Commission approval *Texas & Pacific Ry. Co.* v. *Gulf, C. & S.F. Ry. Co.*, 270 U.S. 266. In doing so, the court is required to determine in the first instance whether the action proposed by the carrier constitutes an "extension," under the teaching of *Texas & Pacific, supra.* The carrier may, of course, voluntarily seek I.C.C. authority, as Milwaukee and Ishpeming did here, in

which case it is the duty of I.C.C. to determine affirmatively its jurisdiction over the transaction. *Yonkers* v. *United States*, 320 U.S. 685. The question then presented is what weight should a reviewing court accord I.C.C.'s finding of jurisdiction? The court below held that I.C.C.'s determination was incidental (Appendix A, page 19) and tried the issue *de novo*.

This is a constantly recurring problem, very basic to many orders of the I.C.C.: what is its jurisdiction to deal with cases involving the expansion or retrenchment of regulated transportation systems? Very frankly, there exist two incompatible lines of decisions by this Court, one holding that the issue of I.C.C. jurisdiction over extension or abandonment of rail line is a "mixed question of law and fact," susceptible of *de novo* determination in a reviewing court;[2] the second, and more recent, line of cases holds that I.C.C. must determine its jurisdiction in a case involving railroad expansion or contraction,[3] and that this I.C.C. determination is entitled to presumptive weight on review, which review is limited to testing the adequacy and sufficiency of the I.C.C. findings.[4] The former line of these decisions, we submit, must be excised from present day doctrine in the interest of conserving judicial and administrative resources and establishing some semblance of harmonious interplay between the courts and regulatory agencies whose activities they review. The court below followed the former line of cases, determining *de novo* the

2. *United States* v. *Idaho*, 298 U.S. 105; *Powell* v. *United States*, 300 U.S. 276.

3. *Yonkers* v. *United States*, 320 U.S. 685.

4. *Shields* v. *Utah Idaho R. Co.*, 305 U.S. 177; *State of Illinois* v. *United States*, 213 F. Supp. 83 (N.D.Ill. 1962), aff'd. 373 U.S. 378; *Public Service Com'n. of New York* v. *United States*, 56 F. Supp. 531 (S.D. N.Y. 1944), aff'd. 323 U.S. 675.

issue of I.C.C. jurisdiction over the rail construction in issue, a holding incompatible with the more recent and, we submit, better reasoned decisions of this Court.

Both *Powell*[5] and *Idaho*,[6] supra, plainly hold that I.C.C. has no power to determine its jurisdiction over a proposed extension or abandonment, that instead this is "a mixed question of fact and law" upon which the court, not the Commission, must speak. Both cases involved review of I.C.C. determinations, and in both the jurisdictional issue was determined *de novo*.

But this "law-fact" formula was long ago discarded,[7] and the *Powell-Idaho* doctrine, we submit, cannot be held to have survived the *Yonkers* case, for the Court there made it plain that an I.C.C. order under Section 1(18) could not be sustained without an express finding by the agency that it had jurisdiction over the line in question. The decision is unequivocal, the Court declaring (320 U.S. at 689, 691-692) that:

> ". . . we deem it essential in cases involving a review of orders of the Commission for the courts to decline to make that determination without the basic jurisdictional findings first having been made by the Commission."
>
> • • •
>
> "The insistence that the Commission made these jurisdictional findings before it undertakes to act not only gives added assurance that the local interests for which Congress expressed its solicitude will be safeguarded. It also gives to the reviewing courts the assistance of

5. 300 U.S. 276 at 287-288.

6. 298 U.S. 105 at 109.

7. *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515; *United States* v. *Drum*, 368 U.S. 370, 376; 4 Davis, *Administrative Law Treatise* §§ 30.01-30.11.

> an expert judgment on a knotty phase of a technical subject."
>
> • • •
>
> "This is not to insist on formalities and to burden the administrative process with ritualistic requirements. It entails a matter of great substance. It requires the Commission to heed the mandates of the Act and to make the expert determinations which are conditions precedent to its authority to act."

Unless, to paraphrase Mr. Justice Frankfurter, "[t]he agency is made to serve as a circumlocution office,"[8] the *Yonkers* decision is positively repugnant to the *Powell-Idaho* formula. Indeed, more recent decisions point clearly toward acknowledging the Commission's role in such determinations by limiting review of these "jurisdictional" fact findings to the review normally accorded administrative agencies. Clearly in point on this precise issue is *Shields* v. *Utah Idaho R. Co.*, 305 U.S. 177, where I.C.C. had determined that the subject carrier was not within the "interurban" exemption of Section 152, Eighth of 45 U.S.C., and thus subject to federal regulation of its employment practices. After the three-judge district court had tried the jurisdictional issue *de novo*, this Court reversed, holding that it had exceeded the permissible scope of review of the I.C.C. order. Unambiguous, indeed, is this decision (305 U.S. at 184-185):

> "What is the scope of the judicial review to which respondent is entitled? As Congress had constitutional authority to enact the requirements of the Railway Labor Act looking to the settlement of industrial disputes between carriers engaged in interstate commerce and their employees, and could include or except interurban carriers as it saw fit, no constitutional question is presented calling for the application of our decisions

8. *Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 518 (Frankfurter, J., dissenting, joined by Justices Burton and Harlan).

with respect to a trial *de novo* so far as the character of the respondent is concerned. With respect to that question, unlike the case presented in *United States* v. *Idaho*, 298 U.S. 105, where the Interstate Commerce Commission was denied the authority to determine the character of the trackage in question (id., p. 107), the Commission in this instance was expressly directed to make the determination. As this authority was validly conferred upon the Commission, the question on judicial review would be simply whether the Commission had acted within its authority. *Interstate Commerce Comm'n* v. *Union Pacific R. Co.*, 222 U.S. 541, 547; *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.*, 227 U.S. 88, 91; *Virginian Railway Co.* v. *United States*, 272 U.S. 658, 663; *Tagg Bros. & Moorhead* v. *United States*, 280 U.S. 420, 444; *Florida* v. *United States*, 292 U.S. 1, 12; *St. Joseph Stock Yards Co.* v. *United States*, *supra*.

The condition which Congress imposed was that the Commission should make its determination after hearing. There is no question that the Commission did give a hearing. Respondent appeared and the evidence which it offered was received and considered. The sole remaining question would be whether the Commission in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious. *Id.* That question must be determined upon the evidence produced before the Commission. [footnotes omitted]."

* * *

"We conclude that the District Court erred in permitting a trial *de novo* of that issue and that the determination of the Commission was within its authority validly exercised. The decree of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court with direction to dismiss the bill of complaint."

A significant number of three-judge district courts have now been persuaded that this Court meant what it said in *Yonkers,* and that since an I.C.C. finding of jurisdiction is mandatory in a 1(18) case, it should be accorded the weight on review which is customarily accorded administrative determinations. Most recently, in *State of Illinois* v. *United States* 373 U.S. 378, the Court affirmed summarily the decision of a three-judge court which, following *Yonkers,* had held (213 F. Supp. 83 at 88) that:

> "The opinion [in *United States* v. *Idaho,* 298 U.S. 105] by Justice Brandeis, while acknowledging that the district court had jurisdiction to determine the classification of the Oregon railroad, did not deny that the determination of the Commission should be given great weight. It merely concluded that the ultimate decision was left to the courts and not to the Commission.
>
> In *City of Yonkers* v. *United States,* 320 U.S. 685, 64 S.Ct. 327, 88 L.Ed. 400 (1943), the Supreme Court was again called upon to review the findings of a district court in determining whether certain operations of the New York Central fell under the exception of Section 1(22). Although agreeing with Justice Brandeis that the determination of what is included within the exemption of Section 1(22) involves a 'mixed question of fact and law,' the Court nevertheless concluded that the Commission should first determine whether the railroad falls within its jurisdiction. In recognizing the importance of the Commission's findings, the Court said at pages 691-692, 64 S.Ct. at pages 330-331:
>
> > 'It is hardly enough to say that the Commission's orders may be set aside by the courts where the Commission exceeds its authority. The Commission has a special competence to deal with the transportation problems which are reflected in these questions. The Congress has entrusted to the Commission the initial responsibility for determining through application of the statutory standards the appropriate line between the federal and state domain. • • • The insistence that the Commission make these jurisdictional findings be-

> fore it undertakes to act not only gives added assurance that the local interests for which Congress expressed its solicitude will be safe-guarded. *It also gives to the reviewing courts the assistance of an expert judgment on a knotty phase of a technical subject.*
>
> • • •
>
> 'This is not to insist on formalities and to burden the administrative process with ritualistic requirements. It entails a matter of great substance. It requires the Commission to heed the mandates of the Act and to make the expert determinations which are conditions precedent to its authority to act.' (Emphasis supplied.)

The case was remanded and the Commission held that it had jurisdiction after it had made detailed subordinate findings of fact. The district court affirmed, *Public Service Commission of New York* v. *United States, D.C.*, 56 F.Supp. 351, and on review the Supreme Court sustained, 323 U.S. 675, 65 S.Ct. 130, 89 L.Ed. 548 (1944). The Court stated at page 675, 65 S.Ct. at page 130:

> 'On remand of the case • • • to the Interstate Commerce Commission for further findings, the Commission reopened the case, took further evidence, and made additional findings. Upon examination of the case now here on appeal we conclude that those findings are sufficient to support the order, and the evidence is sufficient to support the findings. The judgment is affirmed.'

We think these two Supreme Court opinions settle the question of the scope of judicial review so that we may conclude that although this court is not bound by the determinations of the Commission and that the doctrine of 'substantial evidence' is not specifically applicable, nevertheless great weight must be given to the determination of the Commission in an order such as this in which its special competence is clearly recognized [emphasis supplied]."

That the district court in *Yonkers* likewise so understood the Court's remand opinion is clear from its second opinion on review of the second I.C.C. order, *sub nom. Public Service Com'n. of New York* v. *United States*, 56 F. Supp. 351 (S.D. N.Y. 1944), affirmed *per curiam* 323 U.S. 675. The district court read the *Yonkers* opinion as entitling the I.C.C. jurisdictional finding to "at least prima facie weight."[9]

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9. At page 353 of 56 F. Supp. the Court explained that:

"In the light of these previous proceedings, the crucial question before us is, of course, the jurisdiction of the Commission to enter the abandonment order."

• • •

"Such findings, both subordinate and ultimate, surely meet the criticisms of the previous order by the Supreme Court; and, since they were the express objective of the Supreme Court's order of reversal, they must be entitled to at least prima facie weight in our considerations here.

Actually, the effect to be given by the courts to administrative findings of 'jurisdictional facts' is not clear, as, indeed, the majority and minority opinions rendered by the Supreme Court in the present proceedings show."

• • •

"Where, as here, a court is asked to review an order of the Commission issued upon application for a certificate of public convenience and necessity under §1(18), the initial validity of which is premised upon the existence of basic jurisdictional findings by the Commission, there must of necessity be some amelioration of the doctrine that the question of jurisdiction is for the independent judgment of the court. Otherwise it would hardly have been necessary to return the case for such findings. Indeed, in the light of at least some precedents, we were coming to think that review of 'jurisdictional' and 'constitutional' facts was more limited than had earlier been thought. *Gray* v. *Powell*, 314 U.S. 402, 62 S.Ct. 326, 86 L.Ed. 301; *Shields* v. *Utah Idaho Central R. Co.*, 305 U.S. 177, 59 S.Ct. 160, 83 L.Ed. 111; *St. Joseph Stock Yards Co.* v. *United*

That these cases are not unique aberrations in this Court's doctrine of judicial review is revealed by its decision in *United States v. Jones*, 336 U.S. 641, 664, where it alludes to *Shields*, the keystone of our contention, as foundation for "the general rule which gives administrative determinations in such matters presumptive weight (336 U.S. at 664)." This rule, we contend, should have been applied here, where I.C.C. twice ruled affirmatively upon its jurisdiction over the extended line[10] only to have its efforts sloughed off as "incidental".

The Commission has not infrequently been criticized here for obscure reasoning, most recently in *Chicago & E. I. R. Co.* v. *United States*, 375 U.S. ..., ..., 32 U.S. Law Week 3202-3204 (Black, J., dissenting, joined by Mr. Justice Douglas) and *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 654. To tell the agency, as did the three-judge court below, that its very thorough findings are simply an incidental step prior to *de novo* determination in a reviewing court, will certainly not assist in achieving the effective administrative expressions so often sought here. This, we

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States, 298 U.S. 38, 73, 56 S.Ct. 720, 80 L.Ed. 1033; *Steamship Terminal Operating Co.* v. *Schwartz*, 2 Cir., 140 F.2d 7; Brown, Fact and Law in Judicial Review, 56 Harv. L. Rev. 899, 925; Landis, The Administrative Process, 1938, 126-135; 41 Yale L.J. 1037; 46 Harv. L. Rev. 478; 80 U. of Pa. L. Rev. 1055; 22 Corn.L.Q. 515."

Significantly, as we have noted, this decision was affirmed per curiam. *Public Service Com'n. of New York* v. *United States*, 323 U.S. 675.

10. Appendix D, pages 46-50 (Divisio 4); Appendix C, pages 33-36 (Examiner's Proposed Report). I deed, so clear was this issue to the Examiner, that he recomm ded that the matter be referred to the appropriate U.S. Attorn to prosecute Milwaukee and Ishpeming for failure to obtain a proval for this operation (Appendix C, page 36).

submit, is the vice of the opinion below. This also, we submit, is the inevitable result of this Court's failure, so far, to clearly overrule the gutted rule of *Powell* and *Idaho*, which the lower court obviously felt it was following faithfully.

CONCLUSION

The law of judicial review of agency action, it is clear, emanates ultimately only from this Court. *Universal Camera Corp.* v. *National Labor Relations Bd.*, 340 U.S. 274, 477-490; *Attorney General's Manual on the Administrative Procedure Act*, page 109 (1947); *United States* v. *Pierce Auto Lines*, 327 U.S. 515. As we have shown[11] the lower courts have been in doubt on this point at least since 1944, and their decisions, relying upon expressions by this Court which have never been overruled, are in utter conflict.

For these reasons, we submit, this appeal should be considered upon the merits, and the law once and for all made clear, by reversing the decision below.

Respectfully submitted,

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11. Footnote 9, page 11, *supra*.

APPENDIX A

In the United States District Court for the Eastern District of Wisconsin

March 4, 1963.

Civil Action No. 60-C-76.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROADS, PLAINTIFFS

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, DEFENDANTS,

CHICAGO AND NORTH WESTERN RAILWAY COMPANY AND DULUTH, SOUTH SHORE AND ATLANTIC RAILROAD COMPANY, INTERVENING DEFENDANTS.

Before DUFFY, *Circuit Judge*, TEHAN, *Chief Judge*, and GRUBB, *District Judge*.

GRUBB, *District Judge:*

This action is brought by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereinafter referred to as the "Milwaukee Road") and the Lake Superior & Ishpeming Railroad Company (hereinafter referred to as the "Ishpeming") to set aside and permanently enjoin certain orders of the Interstate Commerce Commission (hereinafter referred to as the "Commission").

On October 21, 1957, plaintiffs, the Milwaukee Road and Ishpeming, commenced operation over a newly constructed connection between their main lines of railroad approximately two miles north of the town of Republic in the Upper Peninsula of Michigan, at a point where their respective rights of way are contiguous and parallel. Con-

tinuously and without interruption since that date, plaintiffs have interchanged carload traffic via that connection pursuant to tariffs filed with the Commission.

The connection itself is simply a cross-over track between plaintiffs' respective railroads. It comprises two switches or turnouts, one in each of plaintiffs' lines, which are connected by 262 feet or approximately 0.05 miles of track.

In addition to the connection, two parallel interchange sidings were concurrently constructed and connected at each end, not to the connecting track but to Ishpeming's main line track. The function of the sidings is to temporarily park cars from a train of one plaintiff off the main track until they are picked up by a train of the other plaintiff and to facilitate the various movements required to interchange cars over the connection.

Pursuant to a contract between plaintiffs, the total cost of construction, amounting to approximately $28,690, was shared equally.

On January 3, 1958 the Duluth, South Shore and Atlantic railroad Company, since renamed the Soo Line Railroad Company (hereinafter referred to as "Duluth"), complained to the Commission, alleging that such connection was an "extension" of plaintiffs' respective lines of railroad within the meaning of Section 1(18) of the Interstate Commerce Act, and that no certificate of public convenience and necessity had first been obtained pursuant to the requirements of that section. The Duluth requested the Commission to investigate and require compliance with Sections 1(18) to 1(21).

Plaintiffs' reply averred that the connecting track did not constitute an "extension" as contemplated by Section 1 (18) but rather was a "switching track" within Section 1(22) and, therefore, that the Commission had no jurisdiction in the premises.

The pertinent provisions of the Interstate Commerce Act are set out in the footnote below.*

Plaintiffs nevertheless applied under Section 1(18) for a certificate of public convenience and necessity to operate over the connection. The Chicago and North Western Railway Company (hereinafter referred to as "North Western") was permitted to intervene in opposition to plaintiffs' application. After a hearing held on September 5, 1958, the Examiner found that the Republic Junction

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* Title 49 U.S.C.A.

"§ 1, par. (18). *Extension or abandonment of lines; certificate required; contracts for joint use of spurs, switches, etc.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, • • •."

Par. (19) provides, among other things, that upon application for such certificate, the Commission shall give certain prescribed notices.

Par. (20) provides, among other things, that any construction or operation contrary to the provisions of paragraph (18) may be enjoined by any court of competent jurisdiction by any party in interest.

Par (21) provides, among other things, that the Commission may authorize or require any carrier by railroad to provide itself with safe and adequate facilities and to extend its line or lines.

"§ 1, par. (22). *Construction, etc., of spurs, switches, etc., within State.* The authority of the Commission conferred by paragraphs (18) to (21) of this section, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State. • • •."

connecting track constituted extensions of plaintiffs' respective lines of railroad within the meaning of Section 1(18), and further recommended that plaintiffs' application for a certificate of public convenience and necessity be granted.

On September 25, 1959, Division 4 of the Commission entered its report and order reversing the Examiner's finding that public convenience and necessity required the facility, and affirmed his finding that the connection is an extension of applicants' lines. This order denied the application for a certificate and required plaintiffs to cease and desist from maintaining and operating both the connecting crossover and the interchange sidings at Republic Junction. On April 7, 1960, the Commission entered an order denying plaintiffs' petition to reconsider its prior report and order.

On June 13, 1960, this court issued a preliminary injunction suspending the operation of the Commission's orders pending final determination of the case.

On October 10, 1962, the Commission entered an order annulling, vacating, and setting aside the cease and desist provisions of its prior orders. This action resulted when the Commission determined in another proceeding that under Section 1(20) of the Act, a competent court is the only forum having jurisdiction to grant relief for a violation of Section 1(18) of the Act.

[1] Defendants have filed a motion to dismiss that portion of the complaint which attacks the Commission's jurisdiction under Sections 1(18)-(22) to enter a cease and desist order on the ground that that issue has been rendered moot by the Commission's order of October 10, 1962. That motion is hereby granted.

Plaintiffs' complaint presents two issues for determination: (1) Whether the Commission's finding that the Republic Junction trackage constitutes an "extension" within the meaning of Section 1(18) is correct; and if so, (2) whether the order of the Commission denying a certificate

of public convenience and necessity is supported by substantial evidence.

This court's jurisdiction is based upon Sections 1336, 1398, 2284, 2321, 2322, 2324, and 2325, 28 U.S.C.A.

[2] The question of whether the trackage involved herein is an "extension" or is a Section 1(22) track is a mixed question of fact and law. United States v. Idaho, 298 U.S. 105, 56 S.Ct. 690, 80 L.Ed. 1070 (1936). Although the Commission must incidentally pass on the issue of whether or not a track is an "extension" subject to its jurisdiction whenever an application under Section 1(18) is filed, the final determination of that issue is for the court. Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co., 270 U.S. 266, 46 S.Ct. 263, 70 L.Ed. 578 (1926); Powell v. United States, 300 U.S. 276, 57 S.Ct. 470, 81 L.Ed. 643 (1937).

The principal decision relied on by the Commission is Texas & Pacific Ry. Co., supra. In that landmark case, the Texas & Pacific sued under Section 1(20) to enjoin the Gulf, Colorado & Santa Fe from constructing tracks into an industrial territory adjacent to the line of the Texas & Pacific. The evidence showed that the proposed seven and one-half miles of track would tap territory already adequately served by Texas & Pacific and would divert freight revenues amounting to $500,000 per year. In holding the proposed track to be an "extension" and not a "spur" or "industrial" track within Section 1(22), the court furnished a guideline as to what constitutes an "extension," stating at page 278, 46 S.Ct. at page 266:

> "* * * But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the estab-

> dishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks. * * *"

As the court points out in State of Georgia v. United States, 156 F.Supp. 711 (N.D.Ga. 1957), aff'd 356 U.S. 273, 78 S.Ct. 771, 2 L.Ed.2d 760 (1958), the standard laid down in the Texas & Pacific case is whether or not there is a *substantial* extension into *new* territory. In the State of Georgia decision, the court held there was a *substantial* extension because it would involve substantial expenditures ($523,916) and would run a substantial distance. The facts in that case are not applicable to the situation here. We cannot say that a connecting track 262 feet in length which cost $29,690 to build is "substantial," nor is there any "invasion" into new territory served by the intervening defendants.

No industries are located on or adjacent to the Republic Junction connecting track, and, as the Commission concedes, the movements of the cars from the line of the Milwaukee Road to the Ishpeming, and vice versa, is a "switching movement."

The Commission found that the switching of cars from one carrier to the other permits the plaintiffs to divert traffic from the intervening defendants, the Duluth and the North Western.

Prior to the construction of the connection, there was only one two-line route connecting points on the Ishpeming with Iron Mountain and points south. That route was via the Ishpeming and the North Western. As a result of the connection, there is now an additional route between these

points via the Ishpeming to Republic Junction, and then via the Milwaukee Road. The Commission also found that the connection enabled the Ishpeming to compete for traffic which might otherwise be routed via the Duluth. This results from the fact that the Ishpeming and the Duluth run through the same towns between Marquette and Duncan, Michigan. Prior to the connection, traffic between these points and points served only by the Milwaukee Road was necessarily routed via the Duluth and the Milwaukee Road which connected at Champion, Michigan. The Commission then reasons that since the connection opens up new "traffic patterns" and provides a new "through route" via the Ishpeming and the Milwaukee Road, it has an importance far out of proportion to its length.

[3, 4] The fact that a new "through route" is opened does not make the track an extension of plaintiffs' lines. A "through route" is an arrangement between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to a destination on the line of another. St. Louis S. W. Ry. Co. v. United States, 245 U.S. 136, 38 S.Ct. 49, 62 L.Ed. 199 (1917). The only condition precedent to the existence of a through route is the holding out of the two carriers to provide through transportation service. Thompson v. United States, 343 U.S. 549, 72 S.Ct. 978, 96 L.Ed. 1134 (1952).

The Commission concedes that it has no authority to require carriers to obtain its consent prior to initiating new through routes, but argues that the construction of a new piece of track to enable the carriers to initiate through routes is a factor in determining whether the construction falls under Section 1(18) or Section 1(22). This argument fails to take into account the difference between a "through route" and a through movement of complete trains. There is no through movement of plaintiffs' trains over each other's lines. Neither plaintiff is operating over the line of

the other. The most that can be said is that each plaintiff has physically lengthened its respective line of railroad a distance of 262 feet, the length of the crossover track. The decisions in Alabama & Vicksburg Ry. Co. v. Jackson & Eastern Ry. Co., 271 U.S. 244, 46 S.Ct. 535, 70 L.Ed. 928 (1926), and El Dorado & W. Ry. Co. v. Chicago R. I. & P. Ry. Co., 5 F.2d 777 (8th Cir. 1925), cited by defendants, are inapplicable. Each of these decisions involved an extension of line to a new terminus by means of proposed trackage rights over another railroad.

With regard to the competitive situation between plaintiffs and the intervening defendants, the record shows that Sunrise Landing, Michigan, the eastern terminus of the Ishpeming, is a source of saw logs and chemical wood which is shipped to the Kingsford Chemical Company at Iron Michigan, Michigan, and to the Amasa Lumber Company at Amasa, Michigan. Both of these companies have been served by the Milwaukee Road prior to the Republic Junction connection, as they are now with the connection in operation. Moreover, neither of the intervening defendants, Duluth or North Western, has ever served Sunrise Landing. The only line serving that point is the Ishpeming. Therefore, regardless of the fact that the connection creates a new through route to reach the Amasa and Iron Mountain shippers, it cannot be said that there is an "invasion" into new territory served by the intervening defendants within the doctrine of the Texas & Pacific case, supra.

In Missouri, K. & T. R. Co. of Texas v. Texas & N. O. R. Co., 172 F.2d 768 (5th Cir. 1949), it was held that the Texas & Pacific case did not apply where two railroads already were in competition with each other in territory to which one of them builds a new track. The switching movement over the Republic Junction connection is similar to that which existed in Missouri Pac. R. Co. v. Union Pac. Ry. Co., 60 F.2 126 (D.Kan.1931). In that case the Union Pacific and

the Chicago & Great Western Railway Company had tracks parallel to and adjoining each other. The Union Pacific sought to construct 350 feet of track connecting these two railroad lines, to be used to interchange freight originating on their respective lines and designated for points upon the other line. The proposed connection was to be used to interchange freight which formerly had been interchanged between them via the Missouri Pacific. In holding that the connecting track was not an extension under Section 1(18), the court noted at page 127:

> "It is too small a matter to require the attention of the Interstate Commerce Commission, and is undoubtedly within one of the exceptions that Congress had in mind in enacting the statute referred to."

We think this statement is equally applicable to the track involved here. In addition to the fact that the connection at Republic Junction comprises a relatively insignificant length of 262 feet of track in an unpopulated, wilderness area, it should be pointed out that none of the usual factors or standards indicating that a track is an extension of a railroad line exist here.

In New York Central Railroad Co. v. Chicago & Eastern Illinois Railroad Co., 222 F.2d 828 (7th Cir. 1955), the court held that a proposed track was an "industrial" or "spur" track within the meaning of Section 1(22). In that decision, the Court of Appeals for the Seventh Circuit quoted with approval from United States v. Idaho, 298 U.S. 105, 56 S.Ct. 690, 80 L.Ed. 1070 (1936), wherein the Supreme Court stated at pages 108-109, 56 S.Ct. at pages 691, 692:

> "The Oregon Short Line has never maintained a train schedule or regular service over this trackage; has never furnished express, passenger or mail service; has maintained no buildings, loading platforms or agent at any point along the trackage; and has had

no telegraph or telephone line in connection therewith. * * *"

In addition, the court in the New York Central Railroad Co. case pointed out that no through train service with any other road would be maintained by the defendant in connection with such trackage which laid in an area of undeveloped farm land. See also Pennsylvania Railroad Co. v. Reading Company, 132 F. Supp. 616 (E.D.Pa.1955), wherein the court applies many of the same tests in determining whether a track is an extension of a line of railroad.

[5] Since neither of the plaintiffs in the instant action supplies any of these services over the Republic Junction connection, and since the connection does not extend into territory which heretofore has been exclusively served by the intervening defendants within the doctrine of the Texas & Pacific case, we hold that Republic Junction connection, is a "switching track" and is, therefore, excluded from the jurisdiction of the Commission.

It is a matter of common knowledge that there are many thousands of switches between lines of different railroads where they are in close proximity and over which cars are shifted from one railroad to another. It is inconceivable that Congress intended each of those to be subject to the jurisdiction of the Commission and to be an "extension" of the lines of such railroads; otherwise, there would be no point in Section 1(22) of the Interstate Commerce Act.

In view of the foregoing, we need not pass upon the second issue as to whether or not the Commission's denial of a certificate of public convenience and necessity is supported by substantial evidence.

Plaintiffs are directed to prepare a decree annulling and setting aside the orders of the Interstate Commerce Commission and permanently enjoining the enforcement thereof in accordance with this decision, and are to submit it to defendants for approval as to form only.

APPENDIX B

In the United States District Court for the Eastern District of Wisconsin

Civil Action No. 60-C-76

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY, PLAINTIFFS

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, DEFENDANTS.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY AND DULUTH, SOUTH SHORE AND ATLANTIC RAILROAD COMPANY, INTERVENING DEFENDANTS.

DECREE

This cause coming on for hearing before the statutory three-judge Court convened by the Honorable JOHN S. HASTINGS, Chief Judge of the United States Court of Appeals for the Seventh Circuit, who designated the Honorable F. RYAN DUFFY, Judge of the United States Court of Appeals for the Seventh Circuit, and the Honorable ROBERT E. TEHAN and KENNETH P. GRUBB, Chief Judge and Judge, respectively, of the United States District Court for the Eastern District of Wisconsin, to hear and determine this cause pursuant to Section 2284 of Title 28 of the United States Code upon the complaint of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Lake Superior and Ishpeming Railroad Company, plaintiffs in the above entitled cause, praying for a decree annulling and setting aside the order of Division 4 of the Interstate Commerce Commission dated September 25, 1959, and the order of the Interstate Commerce Commis-

sion dated April 7, 1960, both having been entered by said Commission in its Finance Dockets 20048 and 20139, and permanently enjoining and restraining the enforcement of said orders by the United States of America and the Interstate Commerce Commission, and each of them, their agents, attorneys, officers, servants and employees, upon the ground the Interstate Commerce Commission had no jurisdiction to enter said orders; and upon the motion of the United States of America and the Interstate Commerce Commission, defendants herein, to dismiss those portions of the complaint which attack the Commission's jurisdiction, under section 1(18)-(22), to enter a cease and desist order forbidding further operation by plaintiffs over a certain track known as the Republic Junction connection upon the ground said portion of the complaint is moot in that said Commission has rescinded the cease and desist provisions in its said orders in accordance with its decision in other litigation; and upon consideration of plaintiffs' said verified complaint, the answers of the parties defendant herein, the briefs of the parties upon the issues raised in said pleadings, defendants' said motion and the briefs and memoranda of the parties on the issues raised therein, and such other briefs and memoranda as have been filed in the cause; and it appearing said cause was duly set down for hearing at the Federal Building in Milwaukee, Wisconsin, at 10:00 a.m. o'clock on the 14th day of February, 1963; and after hearing the arguments of counsel, and the Court, being fully advised in the premises, hereby issues the decree hereinafter set forth for the following reasons:

1. The issues raised by the portions of plaintiffs' complaint attacking the jurisdiction and power of the Interstate Commerce Commission to enter the cease and desist provisions contained in paragraph 1 of its said order of September 25, 1959, are moot in that the said paragraph 1 of said order has been annulled, vacated and set aside by order of the said Commission on October 10, 1962.

2. The connecting track between plaintiffs' respective lines of railroad at Republic Junction, Michigan, is a switching track within section 1(22) of the said Act and not an extension of the line of either plaintiff under section 1(18) of the said Act.

3. The order of Division 4 of the Interstate Commerce Commission dated September 25, 1959, and the order of the Interstate Commerce Commission dated April 7, 1960, entered in its Finance Dockets 20048 and 20139, are outside the jurisdiction and beyond the statutory powers of the Interstate Commerce Commission.

NOW, THEREFORE, in accordance with this Court's decision and opinion of March 4, 1963, wherein are set out its findings of fact and conclusions of law, it is hereby ordered, adjudged and decreed:

1. That the motion of defendants, the United States of America and the Interstate Commerce Commission, to dismiss those portions of the complaint which attack the Commission's jurisdiction, under section 1(18)-(22), to enter a cease and desist order be and the same is hereby granted.

2. That the order of Division 4 of the Interstate Commerce Commission dated September 25, 1959, and the order of the Interstate Commerce Commission dated April 7, 1960, as modified by the Commission's order dated October 10, 1962, and entered by said Commission in its Finance Dockets 20048 and 20139, be and the same are hereby annulled and set aside as void and of no effect.

3. That the United States of America, the Interstate Commerce Commission, defendants herein, and the Chicago and North Western Railway Company and the Duluth, South Shore and Atlantic Railroad Company, now known as Soo Line Railroad Company, intervening defendants herein, and each of them, their agents, attorneys, officers, servants and employees, be, and they hereby are, perma-

nently restrained and enjoined from directly or indirectly enforcing the order of Division 4 of the Interstate Commerce Commission dated September 25, 1959, and the order of the said Commission dated April 7, 1960, as modified by the Commission's order dated October 10, 1962, and entered by said Commission in its Finance Dockets 20048 and 20139, or either of them, against plaintiffs or requiring or compelling, or attempting in any manner to require or compel, plaintiffs, or either of them, to comply with said orders.

Dated this 18th day of June, 1963.

/s/ F. Ryan Duffy
F. Ryan Duffy
Judge of the United States Court of Appeals for the Seventh Circuit

/s/ Robert E. Tehan
Robert E. Tehan
Chief Judge of the United States District Court for the Eastern District of Wisconsin

/s/ Kenneth P. Grubb
Kenneth P. Grubb
Judge of the United States District Court for the Eastern District of Wisconsin

APPENDIX C

Interstate Commerce Commission

Finance Docket No. 20048

DULUTH, SOUTH SHORE & ATLANTIC RAILROAD COMPANY

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, ET AL.

Decided.....

Recommended that division 4 find:

(1) That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company have constructed and are operating near Republic, Mich., extensions of their respective lines of railroad in violation of the provisions of section 1(18)-(22) of the Interstate Commerce Act, and order the defendants to terminate such violation.

(2) That the above-described violation of the act should be referred to the United States Attorney with request that prosecution be undertaken under the penal provisions of the act and jurisdiction of the proceeding retained.

(3) That the present and future public convenience and necessity require operation by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company of a connecting track and interchange tracks near Republic, Mich.

Henry S. Mitchell and *Thomas M. Beckley* for Duluth, South Shore and Atlantic Railroad Company.

R. K. Merrill, J. J. Nagle, L. S. Hamilton and *F. M. Long* for Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

Bernard H. Davidson and *Philip H. Porter* for Lake Superior & Ishpeming Railroad Company.

C. H. Dickman and *Edgar Vanneman, Jr.* for Chicago and North Western Railway Company.

REPORT[1] PROPOSED BY JOHN L. BRADFORD, HEARING EXAMINER

On January 8, 1958, the Duluth, South Shore and Atlantic Railroad Company, a common carrier by railroad subject to Part I of the Interstate Commerce Act, hereinafter referred to as complainant or Duluth, filed a complaint alleging that the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company, also common carriers by railroad subject to Part I of the act, hereinafter referred to collectively as defendants or applicants, as the case may be, and individually as Milwaukee and Ishpeming, have constructed and are operating connecting and interchange tracks hereinafter described, near Republic, Mich., in violation of the provisions of section 1(18)-(22) of the act. It seeks an order requiring the defendants to cease such violation. In answer to the complaint filed February 13, 1958, by Milwaukee, and February 14, 1958, by Ishpeming, defendants admit that they have constructed and are operating the tracks specified in the complaint but contend that they are not violating the provisions of the act inasmuch as such tracks are "switching tracks" within the purview of the exemption provided in section 1(22). They also stated that if there is any doubt about the matter they would file an application for appropriate authority. Such application under section 1(18) was filed on March 27, 1958, and a supplemental application under section 5(2) was filed on

[1] This report also embraces Finance Docket No. 20139, Chicago, Milwaukee, St. Paul and Pacific Railroad Company et al. Operations, et al.

August 1, 1958. On April 9, 1958, applicants filed a motion to dismiss their application under section 1, which motion was subsequently made applicable to their application under section 5, on the ground that the tracks involved are "switching tracks" and therefore excepted by provisions of section 1(22) from those of section 1(18) and by the provisions of the latter section from those of section 5(2).

The complaint, applications, and the motion for dismissal of the applications were assigned for hearing on a consolidated record and a hearing was held on September 5, 1958. The applications were amended at the hearing. Briefs have been filed. No representations have been made by State authorit[illegible] Complainant and the Chicago and North Western Railway Company hereinafter referred to as Northwestern have been permitted to intervene in the application cases. Unless otherwise specified all points mentioned herein are in Michigan.

Description of the project.—Near Republic, Ishpeming's line between Duncan and Republic Mine was constructed parallel and adjacent to the line of the Milwaukee extending between Milwaukee, Wisc., and Champion via Iron Mountain and Channing. At the time Ishpeming's line was constructed and subsequently until the tracks involved herein were built, the portion of this line of the Milwaukee located in Michigan connected only at Champion with Duluth's main line, at Channing with the line of the Escanaba and Lake Superior Railroad, and at Iron Mountain with the line of the Northwestern extending between Escanaba and Ashland, Wisc.; and Ishpeming's line, so far as here material, connected at Marquette with Duluth's line, and at Little River with Northwestern's line extending between Ishpeming and Escanaba; but there was no connection between the lines of the Ishpeming and Milwaukee.

The tracks involved herein were constructed in the fall of 1957. They consist of 262 feet of crossover track between

the main lines of the Milwaukee and Ishpeming of which 148 feet are owned by the former and 114 feet by the latter; a track 1,978 feet in length parallel and adjacent to and turning out of the main line of the Ishpeming, hereinafter referred to as track 1, of which 1,076 feet and both turnouts are owned by the latter and 902 feet by the Milwaukee; and a track 1,746 feet in length parallel and adjacent to and turning out of the last described track, hereinafter referred to as track 2, of which 835 feet and one turnout are owned by the Ishpeming and 911 feet and one turnout by the Milwaukee.

Upon the completion of the construction work on these tracks, defendants filed tariffs establishing through routes and joint rates on various commodities over their lines via this crossover track which are now in effect.

The freight-train service of the Milwaukee over its line between Channing and Champion consists of one round-trip schedule 5 days per week. Its northbound train No. 69 is scheduled to leave Channing at 9:30 p.m., Republic at 10:45 p.m. and to arrive at Champion at 11:12 p.m. Its southbound train No. 82 is scheduled to leave Champion at 12:01 a.m., Republic at 12:40 a.m. and to arrive at Channing at 2:15 a.m.

The Ishpeming also operates freight-train service 5 days per week between Ishpeming and Republic. Its southbound train is scheduled to arrive at the cross-over track, hereinafter called Republic Junction, at 10 a.m. and on the northbound trip at noon.

The interchange service at Republic Junction is generally performed in the following manner: Milwaukee's northbound train No. 69 carrying cars for delivery to the Ishpeming is stopped just south of the switch at the crossover track. Here the train is broken and the engine pulls the cars for delivery to the Ishpeming over the crossover track and places them on track 1. The engine is then disconnected from the cars and returns to the train over

track 2 or the Ishpeming's main line whichever is more convenient. The train then proceeds to Champion. On the southbound trip, the train is stopped just north of the crossover track switch where the engine is disconnected from the train and moved south of the switch. The switch is thrown and the engine then moves backwards over the crossover track and on to track 2 where it is connected with cars placed there by the Ishpeming for delivery to the Milwaukee. It then reverses its movement, returns to the train, and proceeds to Channing. The Ishpeming's trains are operated in about the same manner except that the crossover track is not used.

The first question for determination is the character of the tracks used in the performance of the operation described above. If they are "switching tracks" within the purview of section 1(22), their construction and operation are not subject to the provisions of section 1(18) and 5(2) and the complaint and applications here considered should be dismissed. On the other hand, if the tracks are not within the purview of section 1(22), applicants are in violation of the provisions of section 1(18) and the motion to dismiss the applications should be denied.

As heretofore stated, applicants contend that the tracks involved herein are switching tracks. They assert that the tracks are used merely to switch cars from one line to the other and that they are not used for the movement of trains. In one sense they are right. The operation has all of the characteristics of a switching movement. But it is more than that. It is a means for obtaining traffic which, but for the connection, would move over other routes consisting of lines of other carriers. As stated by the United States Supreme Court in *Atlantic Coast Lines* v. *Riverside Mills*, 219 U.S. 186, 198, "through this method (the making of through routes) a situation has been brought about by which though independently managed, connecting carriers become in effect one system".

Applicants cite a number of prior decisions by this Commission and by the courts in support of their contention that the tracks involved are merely "switching tracks". Practically all of the cases relied on, however, are either not in point or they have, in effect, been overruled in subsequent decisions. All of the cited cases decided by this Commission involve applications for trackage rights over existing lines and the facts definitely establish that only switching operations were involved. In *Missouri Pac. R. Co.* v. *Union Pac. Ry. Co.*, 60 F.2d 126, the court refused to enjoin the construction of a track crossing the line of the Missouri Pacific and directly connecting the lines of the Union Pacific and the Chicago Great Western which was in lieu of another connecting track between their lines which had been acquired by the Missouri Pacific and the connection broken. The court held that in these circumstances the new track was a "switching track", exempt from certificate requirements of the act by section 1(22). No appeal was taken from this decision and it became the law of the case in proceedings before State courts, also relied upon by applicants. Those cases, however, should not be considered as controlling the decision here, because the facts involved are different. In those cases an existing connection was broken through action of the Missouri Pacific and the construction was for the purpose of reestablishing the connection. Here there was no connection between defendants lines until the one involved herein was built.

The defendants attempt to distinguish a number of court cases holding that a certificate from this Commission authorizing the construction of tracks connecting two railroads is required before such tracks can be constructed on the ground that they involved the construction of a track which one or both railroads opposed. Applicants apparently concede that a certificate of public convenience and necessity must be obtained from this Commission before two railroads can be forced to provide a connecting track,

but they contend that the certificate would be issued under the provisions of section 3(4) and section 15(3). There is no merit in this contention. Sections 3(4) and 15(3) do not provide for the issuance of certificates and the Commission cannot compel the construction of connecting tracks thereunder. The provisions of the act enabling the Commission to issue orders requiring the construction of connecting tracks are found in section 1(21). See *City of Milwaukee* v. *Chicago & N. W. Ry. Co.*, 283 I.C.C. 311. That section provides that "The Commission may * * * authorize or require by order any carrier by railroad subject to this part (Part I) * * * to extend its line or lines. But the provisions of section 1(22) are also applicable to the provisions of section 1(21). Accordingly, if a track connecting two railroads is merely a "switching track", the Commission has no jurisdiction to require its construction. However, the courts, with the exception of *Missouri Pac. R. Co.* v. *Union Pac. Ry. Co., supra,* and this Commission, have uniformly held that such connecting track constitutes an extension of line within the meaning of section 1(18)-(21) and not excepted from those provisions by the provisions of section 1(22). *Alabama & V. R. Co.* v. *Jackson & E. R. Co.*, 271 U.S. 244, *People* v. *Public Service Commission*, 233 N.Y. 113, *Pipestone* v. *Chicago M. & St. P. Ry. Co.*, 213 N.W. 534, *El Dorado & W. Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 5 F.2d. 777, *Charleston & W. C. Ry. Co. Construction*, 166 I.C.C. 707 and *Great Southwest Railroad Inc. et al. Construction, Etc.*, ... I.C.C. ... (not printed in full), decided June 3, 1958. In the circumstances the Commission should find that the tracks involved herein constitute extensions of the lines of the defendants which lawfully cannot be constructed or operated without first obtaining an appropriate certificate from this Commission. Since defendants have admitted that they have constructed and are operating the tracks without obtaining such certificate, it follows that they are violating the provisions of

section 1(18)-(22) and division 4 should so find, and order defendants to discontinue the violation. Division 4 should also refer this matter to the United States Attorney pursuant to section 12(1) of the act with a request that prosecution be undertaken under the penal provisions of the act.

Since the tracks have been built, it would serve no useful purpose to order their removal without first considering whether they are required by the present or future public convenience and necessity. As previously stated, the tracks were constructed in the fall of 1957, and operations thereover were instituted by the applicants on October 21 of that year. Between that date and June 30, 1958, applicants interchanged at Republic Junction, a total of 1,756 carload shipments of which 1,629 originated at points located on Ishpeming's line and terminated at points on Milwaukee's line; 50 originated on Ishpeming's line and terminated at points beyond Milwaukee's line; 51 originated on the Milwaukee and terminated on the Ishpeming; and 26 originated at points beyond the Milwaukee and terminated on the Ishpeming. Of the 1,629 shipments originating on the Ishpeming and delivered on the Milwaukee, 545 consisted of saw logs transported under "manufacture and reshipping" rates and 955 consisted of chemical wood. As seen these two commodities accounted for 85.4 percent of the total traffic interchanged and 89.3 percent of the traffic delivered by the Ishpeming to the Milwaukee.

Two shipper witnesses testified in support of the applications. A company engaged at Iron Mountain, in the manufacture and sale of hardwood lumber, juvenile furniture, and charcoal, buys about 90 percent of its supply of saw logs for the manufacture of lumber and a much smaller percentage of its supply of chemical logs for the manufacture of charcoal from the Cleveland Cliffs Iron Company. These logs are shipped at consignee's direction from Sunrise Landing on the Ishpeming's road, and the saw logs are moved under so-called manufacture and reshipping

rates, Iron Mountain is served by the Northwestern and the Milwaukee and the plant of this shipper is located on the latter's road. A witness representing the shipper testified that it shipped lumber over both lines and accordingly, in order to receive the benefit of the manufacture and reshipping rates it was necessary to bring in its supply of saw logs over both lines. The routes available to the shipper for this purpose are (1) Ishpeming's road to Little Lake and the Northwestern's line to Antoine where shipments are delivered to the Milwaukee for reciprocal switching to the plant, and (2) Ishpeming's road to Republic Junction and Milwaukee's line to the plant. The latter route involves the lesser time in transit and the consignee is able to receive more definite information on the progress of its shipments. During the summer months, time in transit is important because lumber is subject to stain if manufactured much more than 10 days after the logs are cut. This manufacturer receives between 20 and 30 carloads of saw logs per week.

This company obtains its supply of chemical logs from several sources and more than 50 percent of its shipments are brought in by trucks. This commodity moves on a relatively low rate and routes involving more than a two-line haul are prohibitive. The shipments of chemical logs do not move on transit rates but the shipper divides the traffic between the Milwaukee and the Northwestern as delivering carriers. Both roads have cars available to supplement Ishpeming's car supply when needed.

Another manufacturer of hardwood lumber located at Amasa on the line of the Milwaukee also utilizes applicant's services for the delivery of shipments of saw logs from Sunrise Landing. This shipper also moves its shipments under manufacture and reshipping rates and any other route from this origin would involve a three-line haul at a rate which would be prohibitive. This company receives approximately 200 car-loads of logs per year from

this source and it utilizes truck services from other sources to obtain more than one-half of its log supply. Its witness testified that his company would not be able to utilize Sunrise Landing as an origin point for saw logs if the route through Republic Junction is broken.

The Northwestern contends that it has been adversely affected by the establishment of the Milwaukee-Ishpeming connection and that a grant of the authority sought would merely aggravate this situation. It believes that the chemical and saw logs from Sunrise Landing now moving over the route through Republic Junction would be diverted to its line over the route through Little Lake in the event authority for the former route is not granted. Its witness testified concerning its service between Sunrise Landing and Iron Mountain via Little Lake and the revenues produced by the movement of logs over this route. The distance from Little Lake to Iron Mountain via the Northwestern's line is 92 miles and its scheduled service over this route provides for second morning deliveries. Its witness was aware of a few instances when actual service was somewhat slower than scheduled service. It also appears that the Northwestern's portions of revenues from the movement of minimum shipments of chemical logs and saw logs from Sunrise Landing to Iron Mountain are $35.00 and $51.30 per carload, respectively. These shipments generally move in cars owned by the Ishpeming, and in such instances the Northwestern is required to pay, out of its portion of the revenue (1) per diem charges for cars while they are on its line, (2) a switching charge to the Milwaukee amounting to $9.30 per car, and (3) a per diem reclaim to the Milwaukee of $8.94 per car. Obviously, after payment of these expenses, there remains very little revenue to pay the expense of moving the traffic 92 miles from Little Lake to Iron Mountain.

As previously stated, the interchange tracks at Republic Junction were placed in operation in October 1957. An

exhibit of record shows that during the next 8 months the Ishpeming received 985 carloads of traffic from the Northwestern at Little Lake and only 91 carloads from the Milwaukee at Republic Junction and, excluding saw and chemical logs, it forwarded 1,508 carloads over the Northwestern at Little Lake and only 236 carloads over the Milwaukee at Republic Junction. While the Milwaukee's movement of logs during this period was practically double that of the Northwestern, the exhibit shows that the Northwestern's movement was more than double the amount moved during the next proceeding corresponding period. The record clearly shows that the establishment of the considered connection has diverted little, if any, traffic from the line of the Northwestern.

Duluth, like Northwestern, fears that traffic it is presently handling will be diverted to the new routes via Republic Junction. It presented an exhibit showing that during the year from November 1, 1956 to October 31, 1957, preceding the opening of the new routes, it handled through interchange with the Milwaukee at Champion, 795 carload shipments which, it claims, could have been moved over the new routes if they had been in existence. Of this traffic, 235 shipments moved to or from Ishpeming, 428 shipments moved to or from Marquette, and the remainder moved to or from Negaunee and points on Ishpeming's road not served by Duluth. Similar data for the period prior to the hearing during which the new routes were in existence were not presented for the record. The exhibit shows that 76 different commodities or classes thereof were handled during this period of which only 19 moved in quantities of 10 or more carloads. The latter consisted of 165 carloads of fuel oil, 134 carloads of charcoal, 56 cement, 47 meat, 29 petroleum products, 29 lumber, 22 coal, 19 gasoline, 18 pulpwood, 17 paper, 17 corn flour, 15 veneer cores, 14 sawdust, 14 tractors, 11 scrap iron, 11 wallboard, 11 roofing, 11 rosin, and 10 flooring. An exhibit presented by

the applicants shows that they handled no shipments of fuel oil, meat, petroleum products, coal, pulpwood, corn flour, veneer cores, wallboard or rosin via Republic Junction during the period from October 21, 1957, to June 30, 1958, both inclusive, and only 8 shipments of lumber, 7 of cement, 6 of oil and gasoline, 4 roofing, 4 flooring, 3 tractors and 2 scrap iron. Other commodities which moved over applicants' lines via Republic Junction during this period in quantities in excess of 10 carloads consisted of 984 shipments of chemical wood, 545 of saw logs, 102 of charcoal, 29 ore, 22 sawdust, and 14 paper. Of the last-mentioned commodities, Duluth did not transport any shipments of chemical wood, saw logs or ore during the period covered by its exhibit. It appears, therefore, that applicants' service via Republic Junction is competitive with that of Duluth via Champion, principally with respect to the transportation of charcoal, sawdust and paper, but the record does not show which of these routes is the more convenient for this traffic.

Section 1(4) of the act provides that it shall be the duty of every common carrier by railroad to establish reasonable through routes with other such carriers and provide reasonable facilities for operating such routes. No one has seriously questioned the reasonableness of the through routes via Republic Junction, established by the applicants. The record shows that by far the larger portion of the traffic moving over these routes consist of shipments of saw logs and chemical wood moving from points on the Ishpeming's road to Iron Mountain and that Northwestern is the only other carrier having a competitive rate for this traffic. The shipper of saw logs at Iron Mountain needs service over both routes in order to balance inbound shipments of saw logs with outbound shipments of lumber in connection with applicable manufacture and reshipping rates. Also a shipper of saw logs at Amasa needs appli-

cants' joint service because there is no other competitive route for its traffic. Division 4 should find that operation of the crossover and interchange tracks involved herein is required by the present and future public convenience and necessity.

There remains for consideration, the disposition of the supplemental application filed under section 5 of the act. Obviously, after each applicant obtains authority to operate over the portions of the crossover track and interchange tracks belonging to them, their individual operations over those portions of the tracks belonging to the other company and the Milwaukee's operation over a portion of Duluth's main line north of the crossover is merely a switching movement which is exempt from the provisions of section 5 by the provisions of section 1(18). This application should be dismissed.

RECOMMENDED FINDINGS

Division 4 should find:

(1) That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Lake Superior & Ishpeming Railroad Company have constructed and are operating at Republic Junction, Mich., a crossover track between their respective lines of railroad and two interchange tracks, in violation of the provisions of section 1(18)-(22) of the act; and order said carriers to discontinue said violation.

(2) That the present and future public convenience and necessity require operation by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior and Ishpeming Railroad Company of the crossover and interchange tracks constructed by these carriers at Republic Junction, Mich.

(3) That the supplemental application filed under section 5 of the act should be dismissed.

An appropriate order and certificate should be issued.

APPENDIX D

FINANCE DOCKET No. 20048[1]

DULUTH, SOUTH SHORE & ATLANTIC RAILROAD COMPANY v. CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY ET AL.

Decided September 25, 1959

(1) Found that the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company have constructed and are operating near Republic, Mich., extensions of their respective lines of railroad in violation of the provisions of section 1(18)-(22) of the Interstate Commerce Act. Order entered requiring termination of such violation.

(2) Motion of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company to dismiss the section 1(18) application in Finance Docket No. 20139 overruled.

(3) Present and future public convenience and necessity found not shown to require operation by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company of connecting and interchange tracks near Republic, Mich. Application under section 1(18) denied, and supplemental application under section 5 dismissed.

Henry S. Mitchell and *Thomas M. Beckley* for the complainant.

R. K. Merrill, J. J. Nagle, L. S. Hamilton, F. M. Long, Bernard H. Davidson, and *Philip H. Porter* for certain rail carriers.

[1] This report also embraces Finance Docket No. 20139, Chicago, Milwaukee, St. Paul and Pacific Railroad Company et al. Operations, et cetera.

C. H. Dickman and Edgar Vanneman, Jr., for an intervener.

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS FREAS, WALRATH, AND GOFF

BY DIVISION 4:

Exceptions to the report proposed by the examiner were filed by defendants in Finance Docket No. 20048 and by the interveners in Finance Docket No. 20139. Our conclusions in the latter proceeding differ from those of the examiner.

On January 8, 1958, the Duluth, South Shore & Atlantic Railroad Company, a common carrier by railroad subject to part I of the Interstate Commerce Act, hereinafter referred to as complainant or the Duluth, filed a complaint alleging that the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company, also common carriers by railroad subject to part I of the act, hereinafter referred to collectively as defendants or applicants, as the case may be, and individually as the Milwaukee and the Ishpeming, have constructed and are operating connecting and interchange tracks hereinafter described, near Republic, Mich.,[2] in violation of the provisions of section 1(18)-(22) of the act. It seeks an order requiring the defendants to cease such violation.

In answers filed February 13, 1958, by the Milwaukee, and February 14, 1958, by the Ishpeming, defendants admitted that they had constructed and were operating the tracks specified in the complaint but contended that such tracks are "switching tracks" within the purview of the exemption provided in section 1(22) and, therefore, that such actions were and are not in violation of the provisions of the act,

[2] Unless otherwise specified, all points mentioned herein are in Michigan.

stating that, if there were any doubt, they would file an application for appropriate authority.

Such application under section 1(18) was filed in the embraced proceeding on March 27, 1958, and on August 1, 1958, it was supplemented by a filing under section 5(2) in which approval was sought of the joint use of certain trackage of each by the other. Subsequently, applicants moved to dismiss their applications which motion was subsequently made applicable on the ground that the tracks involved are "switching tracks" and, therefore, excepted by provisions of section 1(22) from those of section 1(18) and by the provisions of the latter section from those of section 5(2).

The complaint, the application, and the motion for dismissal of the application were assigned for hearing on a consolidated record. A hearing was held and the applications were there amended. Briefs were filed. No representations were made by State authorities. Complainant and the Chicago and North Western Railway Company, hereinafter referred to as the North Western, were permitted to intervene in the application case.

The complaint case.—Near Republic, Ishpeming's line between Duncan and Republic Mine was constructed parallel and adjacent to the line of the Milwaukee extending between Milwaukee, Wis., and Champion via Iron Mountain and Channing. At the time Ishpeming's line was constructed, and subsequently until the tracks involved herein were built, the portion of this line of the Milwaukee located in Michigan connected only at Champion with the Duluth's main line, at Channing with the line of the Escanaba and Lake Superior Railroad Company, and at Iron Mountain with the line of the North Western extending between Escanaba and Ashland, Wis.; and Ispheming's line, so far as here material, connected at Marquette with the Duluth's line, and at Little Lake with the North Western's line ex-

tending between Ishpeming and Escanaba; but there was no connection between the lines of the Ishpeming and the Milwaukee.

The tracks involved herein were constructed in the fall of 1957. They consist of (1) 262 feet of crossover track between the main lines of the Milwaukee and the Ishpeming, of which 148 feet are owned by the former and 114 feet by the latter; (2) a track 1,978 feet in length parallel and adjacent to and turning out of the main line of the Ishpeming, hereinafter referred to as track 1, of which 1,076 feet and both turnouts are owned by the Ishpeming and 902 feet by the Milwaukee; and (3) a track 1,746 feet in length parallel and adjacent to and turning out of the last-described track, hereinafter referred to as track 2, of which 835 feet and one turnout are owned by the Ishpeming and 911 feet and one turnout by the Milwaukee.

Upon the completion of the construction work on these tracks, defendants filed tariffs, establishing through routes and joint rates on various commodities over their lines via this crossover track, which are now in effect.

The freight-train service of the Milwaukee over its line between Channing and Champion consists of one round-trip schedule 5 days per week. Its northbound train No. 69 is scheduled to leave Channing at 9:30 p.m., and Republic at 10:45 p.m., and to arrive at Champion at 11:12 p.m. Its southbound train No. 82 is scheduled to leave Champion at 12:01 a.m., and Republic at 2:40 a.m., and to arrive at Channing at 2:15 a.m.

The Ishpeming also operates freight-train service 5 days per week between Ishpeming and Republic. Its southbound train is scheduled to arrive at the crossover track, hereinafter called Republic Junction, at 10 a.m., and on the northbound trip at noon.

The interchange service at Republic Junction is generally performed in the following manner: The Milwaukee's

northbound train No. 69 carrying cars for delivery to the Ishpeming is stopped just south of the switch at the crossover track. Here the train is broken, and the engine pulls the cars for delivery to the Ishpeming over the crossover track and places them on track 1. The engine is then disconnected from the cars and returns to the train over track 2 or the Ishpeming's main line, whichever is more convenient. The train then proceeds to Champion. On the southbound trip, the train is stopped just north of the crossover track switch where the engine is disconnected from the train and moved south of the switch. The switch is thrown, and the engine then moves backwards over the crossover track and on to track 2 where it is connected with cars placed there by the Ishpeming for delivery to the Milwaukee. It then reverses its movement, returns to the train and proceeds to Channing. The Ishpeming's trains are operated in about the same manner except that the crossover track is not used.

The first question for determination is the character of the tracks used in the performance of the operation described above. If they are "switching tracks" within the purview of section 1(22), their construction and operation are not subject to the provisions of sections 1(18) and 5(2), and the complaint and the application here considered should be dismissed. On the other hand, if the tracks are not within the purview of section 1(22), applicants are in violation of the provisions of section 1(18), and the motion to dismiss the application should be overruled.

As heretofore noted, defendants contend that the tracks under consideration are merely switching tracks and, as such, fall within the exemption provisions of section 1(22) of the act. They allege that the tracks are used merely to switch cars from one line to the other; that they are not used for the movement of trains; that no new territory is served by the carriers as a result of the connecting tracks;

and that the establishing of the connection does not constitute an "extension" of the lines of either carrier, as that term is used in section 1(18) of the act. Defendants cite a number of Commission and court decisions which they contend fully support their position.

In *Texas & P. Ry. Co.* v. *Gulf C. & S.F. Ry. Co.*, 270 U.S. 266, the Supreme Court stated as follows:

> A truer guide to the meaning of the terms "extension" and "industrial track" as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers, is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources, and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. • • • The act sought, among other things, to avert such losses.
>
> When the clauses in paragraphs 18 to 22 are read in the light of this congressional policy, the meaning and scope of the terms "extension" and "industrial track" become clear. The carrier was authorized by Congress to construct, without authority from the Commission, "spur, industrial, team, switching or side tracks • • • to be located wholly within one state." Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. The question whether the construction should be allowed or

compelled depends largely upon local conditions, which the state regulating body is peculiarly (sic) fitted to appreciate. Moreover, the expenditure involved is ordinarily small. But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad, within the meaning of paragraph 18, although the line be short, and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks * * *

Considered in the light of the facts involved and the above-quoted decision, it is our opinion that the tracks in question are not mere "switching tracks" utilized for loading, reloading, storing, and switching the cars and for other things merely incidental to the regular train haul, but are, in fact, "extensions" of the lines of both defendants bringing them within the provisions of section 1(18) of the act.

While the physical movement of the cars from the line of one carrier to the other is, as contended by defendants, a switching movement, the act of placing or removing the cars on the connecting tracks is not a mere switching operation that is incidental to a regular train movement. Instead, it is an actual part of the through movement by the traffic without which there would be no through movement by the defendant carriers. It is the sole means by which traffic that would otherwise move over other routes via other carriers may be obtained by defendants. Through the

use of the connecting tracks, defendants have established a through route for the handling of traffic and, as stated by the Supreme Court in *Atlantic Coast Line R. Co.* v. *Riverside Mills*, 219 U.S. 186, 198, "through this method, a situation has been brought about by which, though independently managed, connecting carriers become in effect one system."

Prior to the construction of the connecting tracks there was no connection between defendant lines; there was no way that traffic could be routed from origin to destination over the lines of the defendants; and all traffic destined to points on either of the defendant lines would have moved over routes in which other carriers would have participated. Thus, the creation of the connection enabled both defendants to compete for traffic in territories not previously served by them and which were theretofore adequately served by other carriers.

The courts and the Commission have uniformly held that connecting tracks to be operated under circumstances such as those here involved constitute "extensions" of rail lines within the meaning of section 1(18)-(21) and that they are not excepted from those provisions by the provisions of section 1(22). (See *Texas & P. Ry. Co.* v. *Gulf C. & S.F. Ry. Co., supra; State of Georgia* v. *United States*, 156 F. Supp. 711; *Detroit & M. Ry. Co.* v. *Boyne City G. & A. R. Co.*, 286 Fed. 540; *Citizens of Pipestone* v. *Chicago, M. & St. P. Ry. Co.*, 208 N.W. 809; *El Dorado & W. Ry. Co.* v. *Chicago, R.I. & P. Ry. Co.*, 5 F. (2d) 777; *Charleston & W.C. Ry. Co. Construction*, 166 I.C.C. 707; and *Great Southwest R., Inc., Construction*, 295 I.C.C. 829 (not printed in full), decided June 3, 1958). Under the circumstances here existing the construction of the connecting and interchange tracks here involved constitute an extension of the lines of the defendants, which lawfully could be constructed or operated only upon obtaining an appropriate certificate

from this Commission. An order will be entered in the title proceeding requiring the termination of the violation of section 1(18)-(22) of the act, and the motion to dismiss the section 1(18) application in Finance Docket No. 20139 will be overruled.

The application case—In attempting to establish that the present and future public convenience and necessity require operation over the connecting and interchange tracks, applicants rely in part upon evidence showing traffic moving over the connection since its establishment. Interveners contend that, inasmuch as the traffic was not handled under any color of right, such evidence should be disregarded for that purpose. They assert that the granting of authority to operate the connection, based upon evidence concerning the traffic transported thereover, would have the effect of sanctioning the violation of section 1(18)-(22) and would not be consistent with the public interest.

While we do not condone the failure of applicants to utilize proper caution before proceeding to establish the connection in question, we are of the opinion that the disputed evidence is admissible on, though not controlling of, the issue of public convenience and necessity.

As stated, the crossover and interchange tracks were constructed in the fall of 1957, and operations thereover were instituted on October 21 of that year. The overwhelming preponderance of the traffic moving over the connection during the first 8 months of operations consisted of saw logs and chemical wood. Out of a total of 1,756 cars interchanged between the Milwaukee and the Ishpeming at Republic Junction during the period October 21, 1957, through June 30, 1958, 1,629 originated at points located on the Ishpeming's line and terminated at points on the Milwaukee's line; 50 originated on the Ishpeming's line and terminated at points beyond the Milwaukee's line; 51 originated on the Milwaukee and terminated on the Ishpeming;

and 26 originated at points beyond the Milwaukee and terminated on the Ishpeming. Of the 1,629 shipments mentioned, 545 consisted of saw logs transported under "manufacture and reshipping" rates and 955 consisted of chemical wood. These 2 commodities accounted for 85.4 percent of the total traffic interchanged and 89.3 percent of that delivered by the Ishpeming to the Milwaukee.

Applicants' only evidence relating to the transportation of commodities, other than saw logs and chemical wood, was an exhibit showing the shipments interchanged between the Ishpeming and the Milwaukee at Republic Junction during the same 8-month period. While 21 different commodities or classes thereof, other than saw logs and chemical wood, were handled, only 3 moved in quantities of 10 or more carloads: 102 carloads of charcoal, 22 carloads of sawdust, and 27 carloads of ore. No testimony was presented by any shipper or consignee respecting any need or desire for service over the connection at Republic Junction as to commodities other than saw logs and chemical wood.

A company engaged in the manufacture and sale of lumber, juvenile furniture, and charcoal at Iron Mountain, hereinafter called the Iron Mountain shipper, and a manufacturer of hardwood lumber located at Spur 247, approximately 2 miles out of Amasa on the Milwaukee line, hereinafter called the Amasa shipper, support the application. The Iron Mountain shipper obtains about 90 percent of its supply of saw logs (for the manufacture of lumber) and a small percentage of its supply of chemical logs (for the manufacture of charcoal) from the Cleveland Cliffs Iron Company, hereinafter called Cleveland Cliffs, such logs received by rail are trucked to the railhead at Sunrise Landing, the eastern terminus of the Ishpeming's line, thence by rail to the shipper's plant. Prior to 1958, practically all of its shipments were transported by rail, but since that time approximately 50 percent have moved by truck. Logs form-

erly moved from Seney (on the Duluth) to Champion, thence via the Milwaukee to Iron Mountain, or via the Duluth to Ishpeming, thence the North Western to Antoine Junction north of Iron Mountain, where they were delivered to the Milwaukee for reciprocal switching to the plant. Saw logs move on so-called manufacture and reshipping rates and, in order to receive the transit privilege accruing under such rates, the shipper must route a proportion of its saw logs into Iron Mountain via both of the carriers serving Iron Mountain (the Milwaukee and the North Western) if it is to be enabled to ship finished material outbound over both carriers.

So long as the saw logs moved out of Seney, the shipper had no routing problem since the Duluth had connections with the Milwaukee at Champion and with the North Western at Ishpeming, thus providing alternative routes to Iron Mountain, and traffic could be routed over either of the delivering lines as desired. Since the establishment by the Ishpeming in October 1957, of an extension of its line (about 16 miles, between Cusino and Sunrise Landing) in Schoolcraft and Alger Counties, Mich., authorized in *Lake Superior & I. R. Co. Construction*, 295 I.C.C. 812 (not printed in full), decided November 28, 1956, hereinafter called the *Extension* case, Sunrise Landing, rather than Seney, has been utilized by the Cleveland Cliffs Iron Company as the shipping point for its logs; about 15 miles to the northeast of Seney, it is closer to the logging operation, making it less expensive to truck the logs to the railhead. Since Sunrise Landing is not served by the Duluth, the alternative two-line routing via Duluth-Champion-Milwaukee-Iron Mountain is no longer available. A two-line route from Sunrise Landing via the Ishpeming-Little Lake-North Western-Iron Mountain, is available, but the only routing from points on the extension over the Milwaukee is a three-line movement, with the Duluth a bridge carrier between Marquette and Champion.

Inasmuch as a three-line haul to its plant would involve higher transportation costs and was, therefore, not considered feasible, the Iron Mountain shipper urged the applicants to establish the connection at Republic Junction so that it could have alternative two line routings over either the North Western or the Milwaukee to its plant.

The Iron Mountain shipper obtains its supply of chemical logs from several sources and more than 50 percent thereof is transported by truck. Chemical logs move on relatively low rates, but the costs involved in routing such shipments in more than a two-line haul may be prohibitive. Chemical wood does not move on transit rates, and, therefore, the shipper does not require the alternative routing on that commodity. Nevertheless, it has been the practice of this manufacturer to divide the traffic between the Milwaukee and the North Western for the delivery of its chemical wood since the establishment of the connection at Republic Junction.

The shipper receives approximately 65 carloads of chemical logs and from 15 to 30 carloads of saw logs from Sunrise Landing each week, and controls the routing and pays the freight charges. Although its witness expressed the opinion that the route via the connection at Republic Junction involves less transit time than would be involved if shipments were routed over the North Western, upon cross-examination he was not able satisfactorily to support his position. Transit time is important during the summer months because lumber is subject to stain if manufactured much more than 10 days after the logs are cut and the shipper desires to work the logs as soon after cutting as possible. The shipper is of the opinion that it is able to receive more definite information on the progress of its shipments when routing is via the Milwaukee, and desires the continuance of such service, made possible by the connection at Republic Junction.

The Amasa shipper, located on the Milwaukee, also utilizes the service of applicants for the delivery of shipments of saw logs from Sunrise Landing. The company also moves its shipments under manufacture and reshipping rates, and, prior to the time the Ishpeming extended its line to Sunrise Landing, its shipments originated at Seney. There was a two-line route available from Seney to its plant via Duluth-Champion-Milwaukee. By reason of the new connection at Republic Junction, there is a two-line route available to the plant from Sunrise Landing, but any other route would involve a three-line haul, which, it feels, would involve prohibitive rates. This shipper receives approximately 200 carloads of logs per year from Sunrise Landing but utilizes truck services from other sources to obtain more than one-half of its log supply.

In the event the connection at Republic Junction were closed and it became necessary to utilize a three-line movement involving higher rates, the shipper would turn to truck service for the delivery of its logs. Although delivery delays were experienced from Seney, as well as "bunching" of cars, making it necessary to unload to a dock and to rehandle the logs in order to avoid demurrage, the record does not indicate whether these shortcomings were occasioned by the Duluth or the Milwaukee. The service presently rendered over the connection at Republic Junction is entirely satisfactory to this shipper; it has experienced no "bunching" of cars, and it finds that it is easier to obtain definite information concerning shipments, and that deliveries can be depended upon to arrive on time.

The Ishpeming owns 258 flatcars which are used in transporting saw logs and chemical wood. Of these, 88 have become somewhat worn and are in such condition that they cannot be utilized if placed in large trains. The North Western, which operates longer trains on the lines over which all the saw logs would move were it not for the new connection

has notified the Ishpeming that it no longer can accept in interchange any of the 88 cars mentioned. The Milwaukee, however, operates only light trains through the connection at Republic Junction, and the 88 cars mentioned are entirely adequate for use in such trains. This has resulted in a substantial saving to the Ishpeming since it makes it possible for it to avoid per diem charges on cars owned by other carriers. By being able to use all of its flatcars, and by virtue of a quicker turnaround of cars effected by the Milwaukee than was provided by the North Western, the Ishpeming's fleet of flatcars is adequate to meet the existing need for that type of car.

The North Western and the Duluth vigorously oppose the granting of any authority to applicants for operation of the connection at Republic Junction. They contend that the unauthorized construction and operation of the connection has resulted in a substantial diversion of traffic that had previously moved over their lines; that the continued operation of the connection will have a further adverse effect upon their business by increasing that diversion; that there has been no showing that the public convenience and necessity require operations over the connection; and that applicants have failed to prove that existing carriers cannot adequately, economically, and efficiently handle the traffic now moving over the connection.

With respect to movements of commodities other than saw logs and chemical wood, the competition for traffic resulting from the connection at Republic Junction has not resulted in any substantial diversion of traffic from the North Western and the Duluth to the Milwaukee. During the 9-month period November 1, 1956, through July 31, 1957 (a period prior to the establishment of the connection), the North Western delivered to the Ishpeming at Little Lake 1,383 carloads of commodities other than saw logs and chemical wood, and during the 9-month period November 1,

1957, through July 31, 1958 (a period immediately following the creation of the connection), it delivered 893 carloads of such commodities, or 490 carloads less than during the prior period. During the later period, however, the Milwaukee transferred to the Ishpeming only 62 carloads of such commodities. At most, therefore, the North Western suffered a diversion of only 62 carloads of such traffic. Southbound, the Ishpeming transferred to the North Western 2,349 carloads (other than saw logs and chemical wood) in the 9-month period ended July 31, 1957, and 1,508 carloads in the 9-month period ended July 31, 1958, a difference of 841 carloads. During the latter period, however, there were only 236 carloads (other than saw logs and chemical wood) forwarded by the Ishpeming over the Milwaukee. Thus, on such other commodities, the North Western could not have lost during the first 9 months of operation over the connection more than 62 carloads of the northbound traffic and 236 carloads of the southbound traffic. This amounts to only 7 percent of the 1956-57 volume of traffic (other than saw logs and chemical wood) interchanged by the Ishpeming and the North Western, and less than 12 percent of the total traffic interchanged between the Ishpeming, on the one hand, and the North Western and the Milwaukee, on the other, during the 9-month period of 1958 specified.

While there was no documentary evidence presented showing any specific diversion of traffic from the Duluth as a result of the new routes via Republic Junction, the Duluth did present an exhibit showing that, during the year from November 1, 1956, to October 31, 1957 (a period preceding the opening of the new routes), it handled, through interchange with the Milwaukee at Champion, 795 carload shipments which, it claims, could have been transported over the new routes had they been in existence. Of this traffic, 235 shipments moved to or from Ishpeming,

428 moved to or from Marquette, and the remainder moved to or from Negaunee and points on the line of the Ishpeming not served by the Duluth. Similar data for the period prior to the hearing but during the time the new routes were in existence were not presented for the record. The aforementioned exhibit shows that 76 different commodities or classes thereof were handled during the period indicated, of which there were 19 that moved in quantities of 10 or more carloads: 165 carloads of fuel oil, 134 charcoal, 56 cement, 47 meat, 29 petroleum products, 29 lumber, 22 coal, 19 gasoline, 18 pulpwood, 17 paper, 17 corn flour, 15 veneer cores, 14 sawdust, 14 tractors, 11 scrap iron, 11 wallboard, 11 roofing, 11 rosin, and 10 flooring. During the first 8 months of operation over the connection at Republic Junction, the Ishpeming and the Milwaukee interchanged no shipments of fuel oil, meat, petroleum products, coal, pulpwood, corn flour, veneer cores, wallboard, or rosin, and only 8 shipments of lumber, 7 of cement, 6 of oil and gasoline, 4 each of roofing and flooring, 3 of tractors, and 3 of scrap iron. Of the commodities other than saw logs and chemical wood interchanged by the Ishpeming and Milwaukee during the period mentioned and moving in quantities in excess of 10 carloads, there were 29 carloads of ore, 22 of sawdust, and 14 of paper.

While the foregoing does not permit accurate measurement of the amount of traffic diverted from the Duluth since the new routes via Republic Junction were established, it does establish that comparatively little of the type of traffic, other than saw logs and chemical wood, that was handled by the Duluth prior to the existence of the connection has since been interchanged between the Ishpeming and the Milwaukee. It is also evident that the North Western has continued to handle substantial volumes of traffic consisting of commodities other than saw logs and chemical wood notwithstanding the new connection.

As stated, no testimony was presented by any shipper or consignee as to commodities other than saw logs and chemical wood. Regardless of the amount of such traffic that may have already been diverted as the result of the connection at Republic Junction or the amount that might be diverted in the future, the record shows that the North Western and the Duluth have continued to handle the preponderance of such traffic that has moved over the lines of the Ishpeming since the creation of the connection at Republic Junction, and there is nothing of record to indicate that the service afforded by the North Western and the Duluth in transporting such commodities is in any way inadequate or that there is a need for any additional service. In situations where existing facilities are physically adequate, the addition of more facilities is unwarranted unless it is apparent that some insurmountable obstacle operates to prevent use, in full, of the facilities already in existence. *Atchison, T. & S. F. Ry. Co. Construction*, 261 I.C.C. 227. There is nothing to indicate that the facilities of the North Western and the Duluth cannot be fully utilized for the transportation of commodities other than saw logs and chemical wood or that such carriers are unwilling or unable to provide a reasonably satisfactory service in the transportation of such commodities.

The overwhelming preponderance of the traffic moving over the connection consists of saw logs and chemical wood, and the only public support of the applications is that of the two shippers interested in the transportation of those commodities from Sunrise Landing to their respective places of business. The circumstances leading to applicants' present service to those shippers and over the new connection require special consideration, including our taking official notice of the report in the *Extension* case, in determining the basic question of public convenience and necessity.

As heretofore indicated prior to 1957 there was a sub-

stantial movement of saw logs and chemical wood from Seney to Iron Mountain via the Duluth and the Milwaukee and the Duluth and the North Western, and of saw logs from Seney to Amasa via the Duluth and the Milwaukee.

The Iron Mountain shipper urged the Cleveland Cliffs Iron Company, the supplier of the logs and also the controlling stockholder of the Ishpeming, to find some means of supplying and transporting the logs to Iron Mountain at a reduced overall cost, specifically suggesting the extension of the line of the Ishpeming to a point in the area northeast of Seney closer to the source of the logs. As a result thereof, the Ishpeming filed its application in the *Extension* case, and operations from Sunrise Landing were instituted in October 1957.

The record establishes that, although it urged the Sunrise Landing Extension, the Iron Mountain shipper was aware that if it obtained its saw logs from Sunrise Landing, it no longer would have a two-line route which included the Milwaukee in the absence of a connection between the latter and the Ishpeming, and that without such connection, the only two-line route from Sunrise Landing was via the Ishpeming to Little Lake and the North Western beyond.

Although the report in the *Extension* case states that none of the traffic transported over the extension would be in any "material degree subject to the competition of connecting lines for its routing," thus indicating that most of the traffic would be interchanged with but one carrier, the witness for the Iron Mountain shipper does not believe that the Ishpeming, in applying for the aforementioned extension, contemplated movement of all the saw logs and chemical wood from Sunrise Landing to Iron Mountain via the North Western, he having personally urged, on behalf of his company, the establishment of the connection with the Milwaukee at Republic Junction.

While the record herein does not definitely establish that the proposal for the Sunrise Landing extension and the establishment of the Republic Junction connection were made simultaneously, and that the parties were necessarily aware, at the time the extension application was being considered, that the connection with the Milwaukee would be established and utilized for the interchange of traffic moving over the extension, it is noted that operations over the extension were instituted on approximately the same date that service over the connection at Republic Junction was inaugurated. The record does make it clear, moreover, that the competitive situation changed substantially when operations began over the extension, and that such change resulted from the use of the new connection for traffic moving from the extension.

When its shipments originated at Seney, the Iron Mountain shipper had alternative routings available to it, one via the Duluth to Champion thence to its plant via the Milwaukee. The record establishes that this shipper knew at the time the extension was being considered that there was no physical connection between the lines of the Ishpeming and the Milwaukee, and that the shifting of the origin of its shipments from Seney on the Duluth to Sunrise Landing on the Ishpeming would involve the loss of the two-line routing via the Milwaukee. It is clear, therefore, that either the manufacturer had no interest in a route via the Milwaukee, or it knew at the time the extension was being considered that the connection at Republic Junction was to be established. On the basis of representations made by the applicants that the creation of the connection at Republic Junction was not contemplated at the time the extension to Sunrise Landing was under consideration, we must conclude that the manufacturer, at that time, was primarily interested in originating its saw logs and chemical wood closer to their source, and that the lack of a two-line route

via the Milwaukee from the new origin point was of no material concern to it.

Notwithstanding this earlier apparent lack of interest in the alternative two-line routing via the Milwaukee, the Iron Mountain shipper now bases its support of the instant application upon a need for a two-line routing on shipments of saw logs which will enable it to take advantage of the transit privileges accorded thereunder by utilizing the Milwaukee on outbound shipments of finished lumber.

Prior to the construction of the Sunrise Landing the rates on saw logs from Seney to Iron Mountain were substantially lower than those from Cusino, then the easternmost point on the Ishpeming. After operations were instituted on the extension, however, the rates from Sunrise Landing to Iron Mountain were reduced below those applicable from Seney to Iron Mountain. With this rate reduction, and the reduction in the trucking costs incident to moving the logs to the railhead, the Iron Mountain shipper realized substantial savings in the overall delivered cost of its saw logs. This shipper, of course, still may obtain saw logs from Seney, should it desire to do so, and, from that point, the two-line route via the Duluth to Champion, thence the Milwaukee to Iron Mountain is available. By using such route, the shipper can balance its inbound shipments with outbound shipments via the Milwaukee; it concedes that the service received on shipments from Seney was satisfactory, that, if delivery could be made for the same overall price as now prevails on shipments from Sunrise Landing, it would have no objection to having its shipments originate at Seney, and that, in such circumstances, its claimed need for service via Republic Junction would no longer exist. Use of the Seney railhead, however, involves trucking costs approximately $21 a carload in excess of those to Sunrise Landing. Unless it can obtain the delivery of its logs at a cost no higher than the present delivered cost on shipments

from Sunrise Landing, the shipper represents that it will utilize trucks for the delivery of all of its logs, which are available from suppliers other than Cleveland Cliffs, although it does not indicate what the cost of such delivery would be. As heretofore indicated, the rail rates from Sunrise Landing are now lower than the previous rates from Cusino, although Sunrise Landing is 16 miles farther from Iron Mountain.

The Amasa shipper also supports the application to retain the two-line route via the Ishpeming and the Milwaukee. Although this shipper now claims that it could not afford to utilize the three-line route, which would be the only route available to its plant from points on the Sunrise Landing extension if the connection at Republic Junction were eliminated, the record shows that this shipper knew of the extension application filed by the Ishpeming, and that Cleveland Cliffs would originate shipments of saw logs at points on the extension if that application were granted. The record shows too that this shipper also was aware that, in the absence of a connection at Republic Junction, there would be no two-line service available to it off the extension if that application was approved. Despite such knowledge, this shipper did not participate in the *Extension* case. It appears, therefore, that, at the time the extension application was being considered, either the shipper was not concerned with a need for a two-line route to its plant from points on the extension or it was aware that such a route would be available by the establishment of the connection at Republic Junction; as with the Iron Mountain shipper, we must assume, in the circumstances, the first alternative.

When the origin point for its traffic shifted to Sunrise Landing, the Amasa shipper realized a saving of $3 per thousand log feet, or 2.2 cents per pound in the cost of trucking the shipments to the railhead over the cost that

had been involved in trucking the logs to the railhead at Seney. The shipper believes that the present rate on saw logs from Sunrise Landing to its plant is too high, and at the time of the hearing was negotiating for a rate approximating that prevailing from Sunrise Landing to Iron Mountain. Unless it obtains such a rate, it intends to discontinue rail service and to utilize trucks for the transportation of all its logs.

If the Republic Junction connection were closed, the savings the shipper would realize in trucking costs to the railhead at Sunrise Landing would be more than offset by the added transportation costs involved over the three-line route via the Ishpeming, the Duluth, and the Milwaukee. The two-line service necessary in order that this shipper may take advantage of the manufacture and reshipping rates is, and has been available to it from Seney. In the absence of the new connection, however, it is obvious that the shipper would have to weigh the respective advantages of two-line service from Seney, under which it may use the manufacture and reshipping rates, three-line service from Sunrise Landing, in connection with which it enjoys lower trucking costs, and through movement of its logs by truck.

There is no indication that this shipper has requested Cleveland Cliffs to originate its saw logs at Seney rather than at Sunrise Landing or that it has attempted to obtain its saw logs from any source other than Cleveland Cliffs. There is also nothing to indicate that the shipper, in an attempt to utilize from Seney the two-line service it allegedly requires, has made any attempt to negotiate for a reduction in the trucking costs, the freight rate, or in the other costs involved in obtaining delivery of its saw logs.

It is apparent that the interests of the supporting shippers would be served by utilizing the Republic Junction connection, and that such interests are important in determining the question of public convenience and necessity.

But where, as here, the shippers are already provided with adequate transportation service, the benefits which would inure to them by routing over that connection must be weighed against the detrimental effect, if any, resulting therefrom. *Breckenridge Cham. of Com.* v. *Wichita Falls, R. & F. W. R. Co.*, 109 I.C.C. 81. This includes the probable effect upon competing carriers. As shown in the *Extension* case, the Duluth opposed the granting of authority to the Ishpeming to extend its line to Sunrise Landing, contending that the Ishpeming, as a controlled subsidiary of Cleveland Cliffs would become the originating carrier of the most important shipper from the involved area, and that Cleveland Cliffs might thereby obtain benefits which would result in certain abuses not consistent with the provisions of the act and the public interest. As noted therein, it had been represented that all traffic involved would be outbound and that it would not in any material degree be subject to the competition of connecting lines for its routing. Accordingly, it was found that the record therein did not justify a conclusion that the abuses anticipated by the Duluth would occur.

As heretofore indicated, however, the competitive situation changed substantially when operations over the extension were inaugurated, use of the unauthorized connection providing the Iron Mountain shipper with an alternative two-line route via the applicants' lines and the Amasa shipper with a single two-line route, again over applicants' lines, and both such routes made possible by the connection have been used extensively. Although applicants contend that very little of the traffic moving thereover has been diverted from interveners and assert that, by reason of the low rates under which such commodities move, those carriers would be better off without that traffic, the record shows that use of the unauthorized connection has resulted in traffic being diverted from interveners to applicants;

moreover, even though the commodities involved are low rated, the traffic is nevertheless important to the North Western and the Duluth. These carriers have afforded a transportation service for such commodities over a long period of time, and there is merit to their assertion that in order for any carrier to handle such traffic profitably, it must be handled in large quantities. The North Western contends that the division of the traffic resulting from the establishing of the unauthorized connection will so reduce the volume to be handled by the individual carriers, and thus, so increase their unit costs, that it will be impossible for any of them to realize profit therefrom, possibly resulting in a curtailment of service, especially since the traffic involved moves on scheduled trains.

Since the record shows that a large number of shipments of saw logs and chemical wood have moved over the Republic Junction connection since its establishment in October 1957, whereas all that traffic formerly moved over the lines of other carriers in the area, it cannot be successfully contended that there has been no diversion of traffic as the result of the construction and use of the connection. Such diversion in this area of light traffic density cannot help but be reflected in the earnings of the lines sustaining the loss and might well affect their ability to continue to provide as adequate a service in the area as was previously provided. Existing carriers providing an adequate service should be protected and strengthened against wasteful competition and duplication of services, since to weaken carriers by such methods would result in ultimate injury to the shipping public. *Texas & N.O.R. Co.* v. *Northside Belt Ry. Co.*, 276 U.S. 475.

Aside from the effect which use of the connection has had, or may have, upon established carriers in the area, it has resulted in a new competitive situation between carriers having connection with the Ishpeming so that the traffic

is now subject to direct competition for its routing, and the Ishpeming, as the controlled subsidiary of Cleveland Cliffs, is in the position of being able to play one connection against another, thereby making it possible to provide Cleveland Cliffs a preference by way of concessions in divisions, car supply, or in other ways. Although there is nothing of record to indicate that any of such abuses have occurred, it would not be consistent with the provisions of the act or with the public interest to grant a certificate of public convenience and necessity for a connection making them possible. Moreover, it is our opinion that the benefits which would inure to the two supporting shippers do not offset the detriment to established carriers in the area and to the general public that might result from operation of the connection. In the circumstances, the section 1(18) application should be denied, and the supplemental application under section 5 dismissed.

Contentions of the parties as to either law or fact not specifically discussed herein have been given consideration and have been found to be without material significance or not justified.

Findings

We find: 1. That the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company have constructed and are operating near Republic, Mich., extensions of their respective lines of railroad in violation of the provisions of section 1(18)-(22) of the Interstate Commerce Act; and that, accordingly, the motion filed by such carriers to dismiss the section 1(18) application in Finance Docket No. 20139 should be overruled.

2. That the present and future public convenience and necessity are not shown to require operation by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company of the con-

necting and interchange tracks near Republic, Mich., and, therefore, that the section 1(18) application in Finance Docket No. 20139 should be denied, and the supplemental section 5 application therein dismissed.

An order will be entered requiring the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company, within 45 days from the effective date thereof, to cease and desist, and thereafter to abstain, in the absence of appropriate authority therefor, from maintaining and operating the connecting and interchange tracks near Republic, Mich., overruling the motion to dismiss the section 1(18) application in Finance Docket No. 20139, denying said application, and dismissing the supplemental section 5 application.

COMMISSIONER FREAS concurs in the result.